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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No.PD-0438-18

IN THE
TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
10/17/2018
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS,
PETITIONER,

v.

RICHARD HYLAND,
RESPONDENT

ON PDR FROM THE THIRTEENTH COURT OF APPEALS

RESPONDENT'S REPLY BRIEF

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Summary of the Argument

The court of appeals properly followed established Court of Criminal Appeals precedent to conclude that the smell of alcohol alone is insufficient probable cause for a search warrant.

Issues Presented

I. Whether the court of appeals erred in suggesting that the sustaining of a Franks motion and the purging of false statements from a search warrant affidavit triggers a heightened standard of "clear" probable cause with regard to the remaining allegations in the affidavit.

II. Whether the court of appeals erred in concluding that a strong smell of alcohol on the breath of a driver involved in a serious motor vehicle accident does not furnish probable cause for a blood warrant.

STATEMENT OF ADDITIONAL FACTS

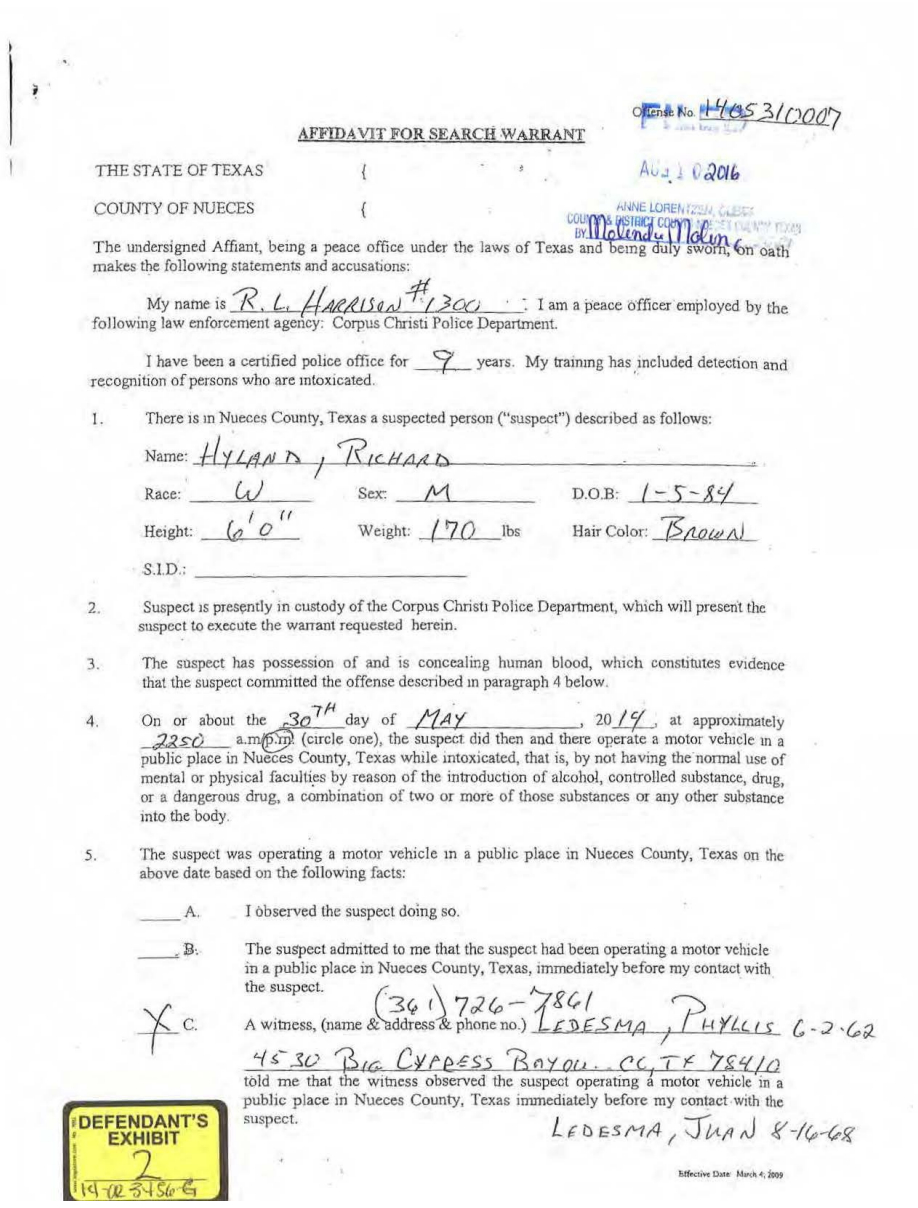
A. Affidavit for Search Warrant

Officer Harrison submitted an affidavit and obtained a search warrant to take a sample of Mr. Hyland's blood. (RR9 at 127, Defendant's Exh. 2). The trial court conducted a hearing outside the presence of the jury, where it concluded that Officer Harrison submitted an affidavit with several falsehoods to obtain a warrant to take Respondent's blood.

To obtain the warrant, Officer Harrison filled out a standard form and submitted it to a magistrate as a sworn affidavit. (DX-2). The preprinted affidavit form contained several allegations concerning the suspect's intoxication and the officer's probable cause to believe that a blood draw would lead to evidence of the intoxication offense. (Id.). Throughout the form were blanks for the affiant to enter the details concerning the facts of the case. For example, the introductory

paragraphs were preprinted and provided only a blank for the affiant's name and term of service with the Corpus Christi Police Department. The stock language then averred that the affiant's police training "has included detection and recognition of persons who are intoxicated."

The body of the affidavit form included nine numbered paragraphs. Officer Harrison entered Respondent's personal information in paragraph one, which described Respondent for all purposes as "the suspect." In preprinted paragraphs two and three, the affidavit stated that the suspect was in custody and was concealing human blood, which constituted evidence of the offense described in paragraph four. Paragraph four asserted that the suspect had operated a motor vehicle in a public place while intoxicated, leaving blanks for the date and time of the offense, which Officer Harrison entered as May 30, 2014, at 10:50 p.m. Paragraph four also recited the statutory definition of intoxication. In paragraph five, Officer Harrison checked a box indicating his belief that the suspect was operating a motor vehicle in a public place, which was "based on . . . a witness"; he entered the contact information of the two witnesses, Juan and Phyllis Ledesma



Offense No. 14053100007

AFFIDAVIT FOR SEARCH WARRANT

AUG 10 2016

THE STATE OF TEXAS {

COUNTY OF NUECES {

ANNE LORENTZEN, CHIEF
COUNTY DISTRICT COURT NUECES COUNTY TEXAS
BY Melendy Molina

The undersigned Affiant, being a peace office under the laws of Texas and being duly sworn, on oath makes the following statements and accusations:

My name is R. L. HARRISON #1300. I am a peace officer employed by the following law enforcement agency: Corpus Christi Police Department.

I have been a certified police office for 9 years. My training has included detection and recognition of persons who are intoxicated.

1. There is in Nueces County, Texas a suspected person ("suspect") described as follows:

   Name: HYLAND, RICHARD

   Race: W Sex: M D.O.B: 1-5-84

   Height: 6'0" Weight: 170 lbs Hair Color: BROWN

   S.I.D.:

2. Suspect is presently in custody of the Corpus Christi Police Department, which will present the suspect to execute the warrant requested herein.

3. The suspect has possession of and is concealing human blood, which constitutes evidence that the suspect committed the offense described in paragraph 4 below.

4. On or about the 30TH day of MAY, 2016, at approximately 2250 a.m./(p.m.) (circle one), the suspect did then and there operate a motor vehicle in a public place in Nueces County, Texas while intoxicated, that is, by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, controlled substance, drug, or a dangerous drug, a combination of two or more of those substances or any other substance into the body.

5. The suspect was operating a motor vehicle in a public place in Nueces County, Texas on the above date based on the following facts:

   ____ A. I observed the suspect doing so.

   ____ B. The suspect admitted to me that the suspect had been operating a motor vehicle in a public place in Nueces County, Texas, immediately before my contact with the suspect.

   X C. A witness, (name & address & phone no.) (361) 726-7861 LEDESMA, PHYLLIS 6-2-62 4530 BIG CYPRESS BAYOU. CC, TX 78410 told me that the witness observed the suspect operating a motor vehicle in a public place in Nueces County, Texas immediately before my contact with the suspect.

   LEDESMA, JUAN 8-16-68

DEFENDANT'S EXHIBIT 2 14-CR-3456-G

Effective Date: March 4, 2009

in an accompanying blank.

Paragraphs six through nine described the basis of Officer Harrison's belief that Hyland was intoxicated, which is reproduced below.

Offense No. 1405310007

6. I made the following observations about the suspect:
   General appearance: BLOODY
   Odor of alcohol: STRONG
   Condition of eyes: —
   Speech: —
   Attitude: —
   Balance: —

7. I requested performance of field sobriety tests by the suspect and recorded the results and my observations of the suspect's performance of filed sobriety tests and signs of intoxication in the attached SFST SCORING SHEET, which is attached hereto and incorporated herein for all purposes.

8. Additional facts leading me to believe that the suspect was intoxicated while operating a motor vehicle in a public place are as follows:
   INVOLVED IN MOTORCYCLE CRASH (CASE# 1402159). PASSENGER DOA & SUSPECT IS IN COMA AT SPOHN MEMORIAL HOSPITAL.

Also See Attached Probable Cause Statement, Which Is Attached Hereto And Incorporated Herein For All Purposes.

9. I have seen intoxicated persons on many occasions in the past. Based on all of the above and my experience and training, I determined that the suspect was intoxicated, and I placed the suspect under arrest for Driving While Intoxicated. I requested a sample of the suspect's breath and/or blood, which the suspect refused to provide.

Wherefore, Affiant asks for a search warrant will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same as evidence that the offense described was committed and that the suspect committed said offense.

Further Affiant asks for issuance of an order to appropriate third parties directing them to assist Affiant in the execution of said warrant.

R. Harrison #1300
Affiant

Subscribed and sworn to before me on this 31ST day of MAY, 2014, at 1:15 a.m/p.m. (circle one).

Judges Signature: _____

Judges Print Name: Mike Memo
Magistrate/Judge, Nueces County, Texas

Effective Date: March 4, 2009

Upon review of Officer Harrison's affidavit, a magistrate signed the warrant at 1:18 a.m., according to the face of Exhibit 2. (Id.).

The affidavit refers to an "attached probable cause statement" in paragraph eight. In that statement, Officer Harrison more fully set out the details of his investigation, his acquisition of the search warrant, and his observation of the blood draw at 2:04 a.m. Based on its content, it is apparent that Officer Harrison drafted this statement sometime after the issuance of the warrant at 1:18 a.m., and this statement could not have been presented to the magistrate in pursuing the warrant. When the timing problem was presented to the trial court, the trial court made clear that its ruling on the *Franks* motion was based solely on Officer Harrison's affidavit itself and not on his later-drafted statement. (RR4 at 15). The appellate court did not consider this statement in determining whether the warrant had a valid basis in probable cause. (Opinion at 5).

B. Excised Statements

Mr. Hyland's trial attorneys asked the trial court to excise paragraphs six, seven, and nine from the search warrant affidavit and determine whether probable cause exited in the four corners of Officer Harrison's afidavit. (RR4 at 16-19). The trial court conducted the Frank's hearing and listened to Officer Harrison testify outside the presence of the jury to determine whether statements should be excised from his affidavit in support of the search warrant. (RR4 at 4).

As to paragraph six of his affidavit, Respondent argued that Officer Harrison never actually smelled the "strong" odor of alcohol on his breath. (RR4 at 18). Instead, Officer Harrison testified at the Franks hearing that when he arrived at the scene of the motorcycle accident, Hyland was already being loaded into the ambulance. (RR4 at 5). Harrison agreed that he did not mention that he smelled alcohol on Hyland in his investigative report; instead, Officer Harrison's report only mentioned that a paramedic told him that Hyland smelled of alcohol. (RR5 at 6).

Officer Harrison testified that when he arrived the medics were already transporting Mr. Hyland. (RR4 at 6). According to Officer Harrison, one of the medics stated he could smell the odor of an intoxicating beverage. (Id). He put that medics could smell the odor of alcohol on Mr. Hyland in his report. (Id). However, the State produced no testimony from medics or witnesses that they could smell alcohol from Mr. Hyland. No medics, emergency responders, or third parties testified that they could smell the odor of alcohol on Mr. Hyland. See the testimony of the Mr. Villareal (RR4 at 40-55), Mr. Ledesma (RR3 55-79; RR4 25-33), Mrs. Ledesma (RR4 55-58); Mr. Denton (RR4 33-40), and Mr. Cordova (RR3 38-55).

The medics contradicted Officer Harrison's testimony regarding the odor of alcohol. Mr. Cordova appeared at trial in his medic uniform, as he is a firefighter/paramedic for the City of Corpus Christi. (RR3 at 39). At 10:50 pm on May 30, 2014, he was dispatched to a motor vehicle accident. (RR3 at 39-40).

When he arrived he saw a group of bystanders in the parking lot, a motorcycle, a fence, a male, and female. (RR3 at 41). Mr. Cordova was not able to smell any alcohol on Mr. Hyland. (RR3 at 42). Mr. Cordova directed his crew to start patient care with the Mr. Hyland, who was lying away from the motorcycle by the road. (RR3 at 41). He was immediately loaded into the ambulance and proceeded to the hospital.(RR3 at 41-42). The State called a fireman, Mr. Denton, who was not on the witness list, so the trial court excused him. (RR4 at 37, 39). Mr. Denton never testified about the smell of alcohol on Mr. Hyland.

At the hearing, Harrison testified he in fact smelled alcohol on Respondent's breath. (RR4 at 7). According to Officer Harrison, he followed the ambulance to the hospital, where he saw Respondent unconscious in a hospital bed. (RR4 at 6). He approached within one or two feet of Respondent's face and smelled a strong odor of alcohol. He then read a statutory warning and drew up his affidavit. Based on Officer Harrison's testimony, the trial court denied Respondent's challenge to paragraph six.

Paragraph seven of Officer Harrison's affidavit says that he requested field sobriety tests from Mr. Hyland. (RR4 at 8). Officer Harrison testified he did not request field sobriety tests from Mr. Hyland because he was in a coma. (Id.). Paragraph 9 states the suspect refused to provide a breath sample. (RR9 at 128). Officer Harrison testified Mr. Hyland was in a coma and could not communicate with him.

Respondent asked the trial court to excise the false paragraph 7 about the field sobriety tests from the affidavit. (RR4 at 17). Respondent also asked the trial court to excise the statements regarding the smell of alcohol, as it is missing from Officer Harrison's probable cause statement and his police report. (RR4 at 18). After an evidentiary hearing, the trial court excised paragraphs seven and nine from the probable cause statement, but not six. (RR4 at 21).

However, the trial court found that even excluding those statements, the redacted affidavit nonetheless stated a sufficient basis of probable cause to believe that a search of Respondent's veins would yield evidence of a crime. (RR4 at 21). The trial court denied/overruled Respondent's motion to suppress the blood evidence. (Id.).

C. **Additional Fact**

Officer Schwartz testified that he has never investigated a motorcycle accident where a female was driving. (RR5 at 169). He claimed it was because, "Well, there's a derogatory term for it. . . .It's called 'riding bitch.' The person on the back is riding bitch, and that's the term. So whenever there's a male and female . ." After Schwartz made that statement, he stared down Mr. Hyland in the courtroom. (RR5 at 170). Mr. Gilmore asked him to quit staring at Mr. Hyland and the trial court instructed him to stop in front of the jury.

ARGUMENT

I. Whether the court of appeals erred by using the "clearly" established probable cause standard.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend IV.

In light of the Fourth Amendment requiring the issuance of a warrant only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched," the Supreme Court developed a hearing to determine if the warrant meets these criteria in the *Franks* case, subsequently called a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154 (1978).

The Fourth Amendment further requires that the grounds for issuance of a search warrant exist only upon a showing probable cause. U.S. CONST. amend. IV. "Every arrest and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan v. Summers*, 452 U.S. 692, 700 (1981). Probable cause exists if "at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v.*

Ohio, 379 U.S. 89, 91 (1964). The magistrate judge makes this determination by looking at all of the facts in the "totality of the circumstances." Suspicion in itself is insufficient to establish probable cause. *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

The Supreme Court in *Franks* mentioned policy considerations in finding a right to the hearing. *Franks,* 438 U.S. at 171. The Court found that the wording "'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Franks*, 438 U.S. at 168.

In the case at hand, the court of appeals stated that in situations where a *Frank's* motion has been sustained, "the question becomes whether, putting aside the tainted allegations, the independently acquired and lawful information in the affidavit clearly established probable cause." (Opinion at 7) (citing *McClintock v. State*, 444 S.W.3d 15, 19 (Tex. Crim. App. 2014).

The court of appeals first relied upon *McClintock*. (Opinion at 7). In *McClintock*, this Court granted the State's petition to answer a similar question, whether a court of appeals erred when excluding illegally obtained information from the search warrant affidavit, the remaining information still served to supply probable cause to search. Id. at 16. In *McClintock* Appellant lived in an upstairs residence above a business. Access to his residence could be gained through a

stairway at the back of the building. Police took a drug-sniffing dog to Appellant's door at the top of that stairway, where the dog alerted to the presence of drugs. This fact was included in a warrant affidavit upon which a warrant to search the residence issued. Charged with possession of a felony amount of marijuana, Appellant filed a motion to suppress the contraband, contending that it had been obtained under a search warrant that was not supported by probable cause. He claimed that the affidavit in support of the search warrant contained illegally obtained information, and that, redacting that information from the warrant affidavit, the remaining information failed to supply probable cause. Specifically, he argued that the police had conducted an illegal search at the door to his apartment using a drug-sniffing dog, and then incorporated that ill-gotten information into the search warrant affidavit. The trial court denied the motion, expressly holding that the police dog had not invaded the curtilage of Appellant's home at the time it alerted to the presence of contraband, and that the use of a drug dog therefore did not constitute a search for Fourth Amendment purposes. Appellant then pled guilty to a reduced charge, preserving his right to appeal the adverse ruling on his motion to suppress.

In discussing the deference to the trial court and the standard of review, this Court stated:

> The magistrate made his assessment of probable cause based upon a warrant affidavit that included far more than Arthur's own detection of the odor of marijuana. He also had the drug dog's alert to rely on, and made his probable cause determination accordingly. When part of a

> warrant affidavit must be excluded from the calculus, as *Jardines* establishes that the information deriving from the drug-dog sniff in this case must, then it is up to the reviewing courts to determine whether "the independently acquired and lawful information stated in the affidavit nevertheless **clearly established probable cause**." Arthur's reference to "the location" from which he smelled the marijuana is sufficiently ambiguous that it cannot be said that, even taken together with the other independently acquired information stated in the warrant affidavit, it **clearly established probable cause**.

McClintock, 444 S.W.3d at 19-20 (emphasis added). *McClintock* uses the phrase "clearly established probable cause" twice in describing the untainted information remaining in the affidavit. In other words, according to the analysis in *McClintock*, the question becomes whether the independently acquired and lawful information stated in the affidavit, putting aside the tainted allegations, clearly established probable cause.

In fact, upon remand to the First Court of Appeals, the First Court cited and applied the "clearly established probable cause" standard upon remand. See *McClintock v. State*, 480 S.W.3d 734, 742 (Tex. App.—Houston [1st Dist.] 2015). Specifically, it decided, "Ordinarily, when a search warrant is issued on the basis of an affidavit containing illegally obtained information, as it was in this case, the evidence seized pursuant to the warrant is admissible only if the independently and lawfully acquired information in the affidavit **clearly established probable cause**." *Id.* (citing *McClintock*, 444 S.W.3d at 19; *Brackens v. State*, 312 S.W.3d 831, 838 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd)) (emphasis added).

The court of appeals opinion in the case at hand also relied upon and is consistent with *Cuong Phu Le,* a post-*McClintock* case, which is described as "a useful book-end" to the decision in *McClintock*. *See State v. Cuong Phu Le*, 463 S.W.3d 872, 881 (Tex. Crim. App. 2015). Unlike *McClintock*, in *Cuong Phu Le*, the Texas Court of Criminal Appeals held that the search warrant affidavit's information supplied sufficient probable cause. *Id*. at 874. A neighbor reported suspicious activity in a vacant house. The officer had extensive investigatory experience concerning indoor marijuana cultivation. *Id.* The affidavit did not identify the neighbor, but the officer knew the informant's identity and that the informant had a clean criminal background. Based on the tip, the officer drove by the house and observed the tightly shut blinds. *Id*. at 875. Investigating further, he subpoenaed the house's electrical utilities records, which listed Cuong Phu Le as the owner. But, according to DPS records, Cuong Phu Le's address on his license did not match the utilities record. *Id.* On a separate occasion, the officer visited the house and heard the air conditioner running even though it was cool outside. The officer concluded that this was consistent with a hydroponic grow operation because the lights used to grow the plants generate a lot of heat. He then walked up to the front door and smelled marijuana. *Id.* Afterwards, the officer conducted multiple night surveillances and saw no lights on other than those on the front and back doors. He contacted another

narcotics officer who observed a car at the residence. When the car left, the officer conducted a traffic stop. He noticed a strong smell of raw marijuana coming from both the car and the driver, Cuong Phu Le. *Id.* The officers then used a drug dog to smell the car and the house's front door. The dog alerted the officers to the front door of Cuong Phu Le's house. Afterwards, a magistrate issued a search warrant and the officers found 358 marijuana plants in the house. *Id.*

The court of criminal appeals held that, even without the dog sniff evidence, there was enough information in the search warrant affidavit to clearly support probable cause. *Id.* at 881. A "search warrant based in part on tainted information is nonetheless valid if it **clearly** could have been issued on the basis of the untainted information in the affidavit." *Id.* (citing *Brown v. State*, 605 S.W.2d 572, 577 (Tex. Crim. App. 1980), abrogated by *Hedicke v. State*, 779 S.W.2d 837 (Tex. Crim. App. 1989)) (emphasis added). In fact, the majority opinion in *Le* used "Clearly Established" Probable Cause in its paragraph title, "*Independent Information Clearly Established Probable Cause*." The Court closed its opinion with, "Because this untainted information in the search-warrant affidavit **clearly established probable cause**, we reverse and remand to the trial court." Id. (emphasis added).

Accordingly, the Court in *McClintock* and *Le* set forth its standard, which is not, as the State suggests, "plainly referring to the 'clear' distinction between the tainted or false information in the warrant." (Petitioner's Brief at 6).

The State argues in footnote two that "there is no reason for the appellate court to depart from its standard practice of giving deference to the magistrate/judge." (Petitioner's Brief at 6, fn2). Respondent respectfully disagrees, as the Court traditionally does not. As to a *Franks* issue, an appellate court has knowledge of possible falsehoods in the affidavit that the magistrate judge may not have known of, and this knowledge base supports the argument that no deference to the magistrate is required. Courts find that "'as a matter of the sound administration of justice,'" deference was owed to the "judicial actor. . . better positioned than another to decide the issue in question." *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988). Courts maintain consistency by using the de novo standard of review for legal issues surrounding the probable cause element of a search warrant, while giving proper deference to the district court through use of the clear error standard on questions of fact related to the *Franks* hearing. *Id.*

Deference to the magistrate is not called for when the question becomes whether an affidavit, stricken of its tainted information, meets the standard of probable cause. *McClintock v. State*, 444 S.W.3d 15, 19 (Tex. Crim. App.

2014). This is, in part, because a "magistrate's judgment would have been based on facts that are no longer on the table," and there is "no way of telling the extent to which the excised portion influenced the magistrate judge's determination." *United States v. Kelley*, 482 F.3d 1047, 1051 (9th Cir. 2007). More importantly, it reinforces the principle that "[a] search warrant may not be procured lawfully by the use of illegally obtained information." *Brown v. State,* 605 S.W.2d 572, 577 (Tex. Crim. App. 1980), overruled on other grounds by *Hedicke v. State*, 779 S.W.2d 837 (Tex. Crim. App. 1989).

II. Insufficient Probable Cause Exists with the Excised Paragraphs

The purged affidavit states only one particular fact related to intoxication: Officer Harrison perceived a strong odor of alcohol from Hyland.

The State cites to several pre-*McNeely/Villarreal* warrantless arrest cases for the proposition that the smell of alcohol with a wreck is sufficient probable cause. (State's Brief at 12-13). However, all of the cases cited by the State point to additional observations of the officer. Smell of alcohol is not the only fact in these cases- it is one of many facts supporting probable cause, including bad manner of driving and failed field sobriety tests. Moreover, the State's cases involve warrantless arrests.

For example, in *Pesina v. State*, 676 S.W.2d 122, 127 (Tex. Crim. App. 1984) (pre-*McNeely*, exigent circumstances, non-search warrant case), the

officer "testified that at the hospital the appellant was muttering and stuttering" despite the lack of blood and injury and "evidence clearly established appellant was the driver of the pickup at the time of the collision." None of those facts are in this case. The probable cause facts in *Pesina* are much stronger than here in Mr. Hyland's case.

Furthermore, as the court of appeals pointed out in its opinion, warrantless cases offer limited assistance to a determination of probable cause after statements have been purged from an affidavit. (Opinion at 10).

In *State v. May*, 242 S.W.3d 61 (Tex. App.—San Antonio 2007, no pet.), the findings of fact reflected "that officers heard the screeching of tires and then observed [Appellant]'s vehicle leave the roadway, travel on the sidewalk, and then strike another motorist." Officer also testified "she had slurred speech and was unsteady on her feet, and her poor performance on the horizontal gaze nystagmus test." None of those facts are in this case. Here, we do not have slurred speech, as Mr. Hyland was in a coma. We also do not have Mr. Hyland being unsteady on his feet, as he was in a coma. We also do not have an HGN test. In other words, the probable cause facts in *May,* another warrantless arrest case*,* are much stronger than here in Mr. Hyland's case and offers limited assistance.

In *State v. Cullen*, 227 S.W.3d 278, 282 (Tex. App.—San Antonio 2007, pet. ref'd), (cited by State at 12) the detective heard the report of a vehicle

traveling at a high rate of speed, saw the same vehicle a minute later approach him at a high rate of speed, and he saw it crash into a telephone pole. The Appellant had slurred speech, bloodshot glassy eyes, and was unsteady on his feet. Id. at 279. He had to hold his hand on the vehicle to balance. Appellant was administered and failed the HGN, walk and turn, and one leg stand tests. None of those facts are in the affidavit in Mr. Hyland's case. The probable cause facts in *Cullen,* another warrantless arrest case, are much stronger than here in Mr. Hyland's case.

In *Knisley v. State*, 81 S.W.3d 478, 483-84 (Tex. App.—Dallas 2002, pet. ref'd), (cited by State at 13) Appellant was unable to answer simple questions such as his name and telephone number. The reviewing court also pointed out Appellant was the only potential driver in the single vehicle accident on a clear day. Appellant repeatedly had to be asked what happened and had to be told he was involved in an accident. The reviewing court found probable cause based primarily on appellant's lack of mental capacity, not just the smell of alcohol. Again, the probable cause facts in *Knisley* are much stronger than here in Mr. Hyland's case.

In *Broadnax v. State*, 995 S.W.2d 900, 904 (Tex. App.—Austin 1999, no pet.), (cited by State at 13) appellant lost control of a car, skidded, hit a ditch, and sped at 95-100 miles an hour. One of the passengers told the investigating officer the Appellant had been drinking alcohol and smoking

marijuana in the car. The passenger told the officer that the marijuana cigarette had embalming fluid on it and Appellant was driving. Id. at 900. The arresting officer had more than the smell of alcohol on which to base his probable cause, including information from the surviving passenger. Again, the probable cause facts in *Broadnax* are much stronger than in Mr. Hyland's case.

In *Mitchell v. State*, 821 S.W.2d 420, 424-25 (Tex. App.—Austin 1991, pet ref'd), (cited by State at 13) when the officer arrived appellant was still sitting in the driver's seat in his seat belt. Id. at 424. Appellant's vehicle, while traveling 80 miles an hour, struck an elevated concrete drainage culvert. The reviewing court reversed appellant's conviction because the district court never acquired jurisdiction. Again, the probable cause facts in *Mitchell* are much stronger than in Mr. Hyland's case.

The State even admits in its brief that there were additional clues to intoxication in *State v. Villareal*, 476 S.W.3d 45, 50 (Tex. App.—Corpus Christi 2014). In that case appellant had red, watery eyes, slurred speech and was swaying back and forth. (State's Brief at 13). There is no testimony in Officer Harrison's affidavit about Mr. Hyland's eyes or speech or swaying back and forth- just the smell of alcohol. Again, the probable cause facts in Villarreal are much stronger than in Hyland's case.

In summary, the arresting officer's affidavit, with the removed false statements, does not have sufficient probable cause to support the search warrant for the blood draw. Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient themselves to warrant a man of reasonable caution in the belief that a particular person has committed an offense. In *Domingo v. State*, an officer had a consensual conversation with the appellant in a public area. The officer noted a strong smell of alcohol, but no abnormalities in his speech or eyes before detention, as well as no sight of him drinking an alcoholic beverage. 82 S.W.3d 617, 622 (Tex. App.—Amarillo 2002, no pet.). Upon the argument that no reasonable suspicion existed, the court did not find articulable facts "which could have led a reasonable officer to suspect the appellant of public intoxication other than the strong smell of alcohol, about which [the officer] testified on which he based his suspicion." Id. In essence, according to *Domingo*, the odor of alcohol alone is not even enough to detain a person for the Class C misdemeanor offense of public intoxication.

The court in *State v. Brabson* expands on this issue by stating that the test for a warrantless arrest is based on surrounding facts and circumstances that must provide probable cause to conclude that the person arrested has committed an offense. 899 S.W.2d 741, 747 (Tex. App—Dallas 1995), *aff'd*

by State v. Brabson, 976 S.W.2d 182 (Tex. Crim. App. 1998). Additionally, "it is well established that "an investigating officer's hunch, suspicion, or good-faith perception are not sufficient enough, standing alone, to constitute probable cause for an arrest." Id.

In the case at hand, the only information known to Officer Harrison prior to the arrest was that someone had died in a motorcycle accident, Defendant was allegedly driving the motorcycle, and he smelled an odor of alcohol on Defendant's breath. Officer Harrison failed to administer any common field sobriety tests whatsoever, including the standard checks for slurred speech, watery eyes, or bloodshot eyes. He could have investigated further, but failed to do so. He failed to include other physical or mental conditions of Respondent that would tend to lead one to suspect another of intoxication.

Prayer

Wherefore, premises considered, Respondent, Richard Hyland prays that the Court uphold the Thirteenth Court of Appeals decision reversing the conviction and remanding to the trial court for further proceedings and any other relief that he may be entitled.

Respectfully Submitted,

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Attorneys for Richard Hyland

CERTIFICATE OF COMPLIANCE

I, John Gilmore, certify this brief contains 4,624 words in those matters not exempted by Rule 9 as counted in the Pages application.

/s/ *John S. Gilmore*
John S. Gilmore

CERTIFICATE OF SERVICE

This is to certify that on October 16, 2018, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Nueces County, 901 LEOPARD STRET, CORPUS CHRISTI, TEXAS 78401, as set forth in Texas Rules Appellate Procedure for delivery of electronically filed documents.

/s/ *John S. Gilmore*
John S. Gilmore